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Supreme Court, U.S.
FILED

No. _____ '99 175 JUL 26 1999

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In The
Supreme Court of the United States
October Term, 1998

FRANK W. McINTYRE, Individually
and as Assignee of Robert Milbank, Jr.,
Chapter 7 Trustee,
Petitioner,

vs.

GEARY & SPENCER, P.C., f/k/a GEARY,
STAHL & SPENCER, P.C., CLEVE CLINTON
and JOHN PALTER,
Respondents.

Petition For Writ of Certiorari
To The Texas Court of Appeals
[Fifth Dist.] At Dallas, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether dismissal of a civil appeal for failure to follow a briefing rule comports with due process and equal protection of the law, where:

(i) the briefing rule provides for a 50-page limit, excluding certain formal pages from the count, but does not specify any font sizes or margin requirements;

(ii) the briefing rule provides that substantial compliance is sufficient, and that the court may allow a longer brief on motion;

(iii) the state constitution and statutes provide for a mandatory first right of appeal to the Court of Appeals, as opposed to a discretionary further appeal to the Texas Supreme Court, and neither the statutes nor the appellate briefing rule provide for the sanction of dismissal of the appeal for failure to comply with the page-limit rule.

(iv) Petitioner, the pro se appellant, first submitted a 94-page brief with a motion to exceed the page-limit, which the appellate court denied and struck the brief with a re-briefing order, followed by a second and then third brief pursuant to re-briefing orders, with the third brief being in a standard type-face with 7/8-inch top and bottom margins, ½-inch left-right margins, comprising 52 pages *including* four formal pages excluded from the page-count; and

(v) after a fourth re-briefing order, Petitioner asked for clarification of how the final 52-page brief violated the briefing rules, but the appellate court refused to clarify its order and dismissed the appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas was not reported. The unpublished Opinion and Order is reprinted in the Appendix at App. 1. The Order of the Court of Appeals denying Petitioner's Motion for Rehearing is reprinted in the Appendix at App. 10. The Orders of the Supreme Court of Texas denying discretionary review, assessing sanctions against Petitioner, and refusing to reconsider its order denying discretionary review are reprinted in the Appendix at App. 11 - App. 15.

JURISDICTION

The Supreme Court of Texas entered its order denying writ on August 25, 1998, and it denied a timely motion for rehearing on February 25, 1999. On May 27, 1999, Justice Scalia extended the time to file a petition for writ of certiorari to and including July 25, 1999. The letter from Francis J. Lorson, Chief Deputy Clerk, referencing Application No. A-990, is reprinted in the Appendix at App.41. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES (APPELLATE PROCEDURE RULES) INVOLVED

This is a Due Process and Equal Protection statutory construction and as applied challenge to the Texas Rules of Appellate Procedure, Rules 60(a)(2) and 74, and the Texas Fifth Court of Appeals local rule 1:74.

These appellate procedural rules are reprinted in the Appendix at App. 17, App. 21, and App. 23, respectively.

The Due Process Clause and Equal Protection Clause are found in U.S. Const. amend. XIV, § 1, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the issue of whether a pro se litigant's efforts to comply with briefing rules limiting the number of pages in the brief, which include a motion to the appellate court to clarify how his third reduced brief failed to comply, may properly justify dismissal of a mandatory first appeal without such clarification. Petitioner explained

his understanding that his third attempt complied with the briefing page limitation, but without further explanation the Court of Appeals dismissed the appeal. The facts and circumstances supporting Petitioner's claim that he was denied Due Process and Equal Protection are stated as follows.

1. Frank W. McIntyre ("McIntyre" or "Petitioner"), a computer programmer in a business software support partnership, in 1986 retained Cleve Clinton and John Palter of the law firm Geary, Stahl & Spencer, P.C. to represent him in a partnership accounting suit. After the suit and related proceedings were over, McIntyre sued his former attorneys for legal malpractice, alleging they had negligently failed to recover his share of profits between the dissolution event and final judicial winding up of the partnership. App.41- App. 46. The legal malpractice

action is the underlying suit below. The trial court rendered judgment against McIntyre and he appealed, pro se, to the Fifth Court of Appeals of Texas in Dallas, referred to as "the court" below unless otherwise required by the context.

2. Texas Rules of Appellate Procedure, rule 74(h), (p), in effect at the time of McIntyre's appeal, stated:

> **(h) Length of Briefs.** Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.
>
> **(p) Briefing Rules to Be Construed Liberally.** The purpose of briefs being to

> acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

Local Rule 1:74(b) of the Fifth Court of Appeals provided:

> **Page Limit.** A brief shall be limited to 50 pages or less, unless leave is obtained from the Court to file a brief in excess of 50 pages. The Court may order rewriting of a brief of more than 50 pages or may consider only the first 50 pages of the brief.

3. Petitioner simultaneously submitted a 94-page brief to the clerk and filed a motion to exceed the page limit. App.47. McIntyre asked in the alternative for a 15 day extension "to condense the brief so that it conforms to the 50 page limit" if the court denied the main relief. Respondents opposed the motion. App. 51. The court ultimately denied the request to exceed the page limit,

ordered the 94-page brief struck, and granted fifteen days for McIntyre to submit "a brief in full compliance with the letter and spirit of TEX. R. APP. P. 74(h)." App.3-App.6.

4. McIntyre then submitted a brief with the argument and authorities section reduced to 49 pages. He put record page references by footnotes to an appendix of record references, and reduced the left-right margins from approximately 3/4-inch to ½-inch. He concurrently filed a motion asking the court to determine that his brief conformed to the briefing rules, or alternatively to grant leave to exceed the page limit, or in the further alternative to grant another 15 day extension "to further condense the brief." App. 56 - App. 60. By this time he had become licensed as an attorney and included his new state bar number. By March 3, 1997 Order, the court determined that "Appellant's brief does not conform to the letter or

spirit of the rules of appellate procedure. *See White v. Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991)." App. 3 - App.5. It ordered McIntyre "to file a brief in full compliance with the letter and spirit of rule 74(h) within fifteen days." App. 5.

5. On March 18, 1997, McIntyre submitted his third attempt at a conforming brief. The brief was 52 pages long, including pages with points of error and other matters excluded from the page count under TEX. R. APP. P. 74(h). It had 7/8-inch top and bottom margins, ½-inch left-right margins, and the same 12 point Times New Roman Font as his prior briefing attempts. In reducing the brief, McIntyre had actually increased the number of points of error by ten in his effort to make the points of error more precise. App. 70- App. 71.

6. The court issued an April 16, 1997 Order striking McIntyre's third brief. App.3. The court stated that, like the second brief,

> appellant's March 18, 1997 brief has reduced margins. Furthermore, appellant's brief is in excess of fifty pages. We also note that despite this Court's order directing appellant to reduce the length of his brief, appellant added ten points of error to his brief. Appellant did not file a motion for leave to file the brief. Appellant's March 18, 1997 brief does not comply with the letter or the spirit of rule 74(h).

App. 5. The court analogized the situation to the facts of *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex.), *cert. denied*, 502 U.S. 861 (1991), stating that

> Like the petitioner in *White Budd Van Ness*, appellant has been given three opportunities to comply with the page limitations of the rules of appellate procedure, but has failed to do so. Although he is representing himself pro se in this matter, he is a licensed

> attorney. By filing a third brief in violation of rule 74(h), appellant has flagrantly disregarded the rules of appellate procedure and has violated this Court's March 3, 1997 order.

App.6. The court ordered McIntyre to submit "a brief in full compliance" in ten days, further cautioning him that the appeal may be dismissed if he should not "comply fully with rule 74(h)."

7. On April 18, 1997, McIntyre filed a begging motion in response the court's April 16, 1997 Order. App. 67. He explained why he believed his third brief complied with rule 74(h) and asked the court to reinstate it. He asked the court to clarify what margins were required and how the brief otherwise failed to comply. He asked the court for additional time to submit a conforming brief if his third brief were not reinstated, and asked for leave to file the ten additional points, which he explained were a rewording of

prior "multifarious" points. He explained that he could not find either in the rules or the *White Budd Van Ness* case what the margin requirements were. He distinguished his situation from *White Budd Van Ness* because he had made substantial reductions from his original 94 page brief to the 52 page third brief, because he was making good faith efforts to comply with the briefing requirements.

8. The court responded with an unpublished May 29, 1997 Opinion and Order denying McIntyre's April 18, 1997 motion without addressing his request for clarification and holding that because he did not file a fourth brief "in full compliance with the letter and spirit of rule 74(h)," (App. 1), the court, pursuant to TEX. R. APP. P. 60(a)(2) (App.23), 74(*l*)(1) (App. 19- App. 20), and the *White Budd Van Ness* case, dismissed the appeal. McIntyre filed a motion for rehearing, which the court overruled.

App.10. McIntyre then filed an application for writ of error to the Supreme Court of Texas, which denied discretionary review App.11. and further sanctioned McIntyre for a frivolous appeal. App. 14. McIntyre filed a motion for rehearing which the Texas Supreme Court overruled. App. 13.

STATEMENT OF PRESERVATION

The ground for error, dismissal of a mandatory right of appeal for procedural reasons, first arose in the Court of Appeals. In his Motion for Rehearing to the Court of Appeals, Petitioner argued a cluster of points of error asserting that the appellate court erred in striking his March 18, 1997 brief, erred in denying his motion to reinstate such brief, erred in denying his motion to clarify the re-briefing order, and erred in failing to extend the time to allow him to submit a conforming brief. App. 24- App.

29. In arguing these points, Petitioner twice cited this Court's due process and equal protection holdings in a criminal case, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct 2294 (1972), as analogous, and argued the Court of Appeals' action was "exactly the kind of arbitrary action that the United States Supreme Court sought to prevent in" *Grayned*. App. 27.

In Petitioner's Application for Writ of Error to the Texas Supreme Court, in addition to the points asserting error as indicated above, he reworded one point to state that "the standard that the court ordered McIntyre to comply with was unconstitutionally vague absent clarification." App. 30. He again asserted the Court of Appeals' action "is exactly the kind of arbitrary action" which "the United States Supreme Court sought to prevent in the case of *Grayned v. City of Rockford*." App. 35.

Finally, in his Motion for Rehearing to the Texas Supreme Court, Petitioner argued "the court violates the due process and equal protection clauses of the 14th Amendment to the United States Constitution," and cited two additional opinions of this Court. App. 39.

REASONS FOR GRANTING THE WRIT

The Due Process and Equal Protection Clauses protect individuals from civil sanctions which are downright irrational. *Hudson v. United States*, 522 U.S. __, __, 118 S.Ct. 488, 495, 139 L.Ed.2d 450 (1997), citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The sanction of dismissal of Petitioner's appeal qualifies as "downright irrational" because, under the facts and circumstances presented, it complies with neither the state constitutional and statutory provisions, nor the rules applicable to Petitioner's appeal,

and thereby violates the Due Process and Equal Protection Clauses of the United States Constitution.

Although a State has no obligation to provide appellate review to have a constitutional court system, once it has undertaken to do so, due process and equal protection require that it must assure proper notice of its requirements, the sanctions to be imposed for failure to meet these requirements, and that the process is applied equitably, fairly and equally to all who pursue its remedies. *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972); *Gardner v. California*, 393 U.S.367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). This the State of Texas utterly has failed to do in Petitioner's case.

The due process requirement includes a substantive component so that, for example, a jury may not exercise unfettered discretion to assess punitive damages without appellate review of the relationship of such damages to the actual damages and other facts and circumstances of the case. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21, 114 S.Ct. 2331, 2335, 135 L.Ed.2d 76 (1994). Analogous to the requirement for criminal laws that the statute must give fair notice to the defendant of what conduct the law prohibits, *see, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299 (1972); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559, 76 S.Ct. 637, 100 L.Ed. 692 (1956) (arbitrariness is a signal of a violation of substantive due process); *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), a civil litigant is entitled

to fair notice of the standards by which he will be reviewed.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982), this Court stated that due process applies to protect property rights, that a cause of action is a species of property under the Constitution, and that there was "no meaningful distinction between the [property] cause of action" and the right to use the state administrative adjudicatory process at issue in the case. In *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 789, 28 L.Ed.2d 113 (1971), the Court held that denying indigents the right to sue for divorce because they could not pay filing fees was "the equivalent of denying them their opportunity to be heard upon their claimed right." In *Logan*, the Court further stated that the right to divorce was not "a property interest in the same

sense as is a tort or a discrimination action" but the analogy to *Boddie* applies because the

> theories . . . [are] not very different: having made access to the courts an entitlement or a necessity, the state may not deprive someone of that access unless the balance of state and private interests favors the government scheme.

Logan v. Zimmerman Brush Co., 455 U.S. at 430 n. 5, 102 S.Ct. at 1154 n.5. Indeed, due process permits the party "the opportunity to present his case and have its merits fairly judged." *Id.* at 433, 102 S.Ct. at 1156. A state affords due process "when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule," *id.* at 437, 102 S.Ct. at 1158, but here the briefing rule was not reasonable as applied to McIntyre because of its ambiguity under the circumstances, and because the Court of Appeals declined to clarify its requirements.

The right of a civil litigant in Texas to a first appeal

in the state's Courts of Appeals is mandated by its constitution and statutes, and may not be denied in the absence of some statutory provision which specifically permits such denial:

> [The court] cannot deny the right of appeal from such a [district court] judgment without violating the right expressly guaranteed by section 6 of Article 5 of the [Texas] Constitution . . . [Nor can the court] give effect to the right of appeal from *every* final judgment . . . and withdraw the right as to certain final judgments . . . in the absence of special statutory direction.

Lafield v. Maryland Cas. Co., 33 S.W.2d 187, 188 (Tex. 1930) (emphasis in original).

It is necessary to ask what process was provided, and whether it was constitutionally adequate, examining the procedural safeguards built into the scheme and any remedies for erroneous deprivations. *Zinerman v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 983, 108 L.Ed.2d 100

(1990). Texas appellate rule 74(h), under which Petitioner filed his appeal, neither specifies what margins are required nor what font types or sizes are allowed. Referring to the *White Budd Van Ness* case, which, unlike this case, is a decision of the Supreme Court of Texas in a *discretionary* appeal under TEX. GOV'T CODE § 22.001(a)(6) (App. 15), does not clarify what the "letter and spirit" of the rule require, because the opinion merely states that constricting margins and shrinking type faces to make it all fit in 50 pages, thereby making it difficult to read, violates the spirit if not the letter of the rule. 811 S.W.2d at 541, App. 81.

Petitioner's third brief had margins and a standard font size which did not make the brief difficult to read. Petitioner, who as a pro se appellant became the most neophyte of lawyers during his case's sojourn in the Texas

Court of Appeals, sincerely sought guidance from the court to make his brief comply with this vague, unspecified "spirit" of the rule.

It is true that court or administrative opinions may clarify ambiguity, but when further ambiguity remains as applied to the claimant's particular situation, he may raise that issue in his "as applied" challenge based on his particular facts. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 & n.7, 102 S.Ct. 1186, 1191 & n.7, 71 L.Ed.2d 362 (1982). Under Petitioner's circumstances the *White Budd Van Ness* case provided no guidance, no "explicit standards for those who apply them" and its application in Petitioner's case led to the dismissal sanction in violation of applicable provisions of the state's own constitution, statutes and rules, "on an *ad hoc* and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299 (1972).

Due process cannot be precisely defined, but it does require that judicial proceedings be fundamentally fair under the time, place and circumstances, considering relevant precedents and then assessing the several interests that are at stake. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981). The interests to balance include the private interests at stake, the government's interest, and the risk that the procedures will lead to erroneous decisions. *Lassiter* , 452 U.S. at 27, 101 S.Ct. at 2159, 68 L.Ed.2d 640. Petitioner has a very high private interest in having his appeal determined on its merits. The government's interest in the efficiency of the

appellate process is significant, but the paramount factor should be the risk of erroneous decisions, balanced against the difficulty of giving guidance on what the "spirit of the rule" means.

Rule 74(p) provides that substantial compliance is sufficient, in the interests of justice. The standard for permitting an appeal cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Lindsey v. Normet*, 405 U.S. at 77, 92 S.Ct. at 862, 31 L.Ed.2d 36. *Carey v. Piphus*, 435 U.S. 247, 259-60, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978), explains that

> procedural due process rules are shaped by the risk of error inherent in the truth-finding process [citing *Matthews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976)] . . . [Such rules] minimize substantially unfair or mistaken deprivations of "life, liberty or property by enabling persons to contest the basis upon

> which a State proposes to deprive them of their protected interests." [Citing *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972).]

In *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), in which a plaintiff's claim was dismissed for failure to comply with a trial court's order, the Court wrote that due process imposes

> constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

Surely Petitioner should have been entitled to some clear direction from the appellate court on what more he needed to do to bring his third brief into compliance with the undefined "spirit" of the rule.

The "substantial compliance" directive is an additional arbitrary component of applying the page-limit

rule. The apparent discretion of the Texas Court of Appeals under rule 74(p) to decide some party's 52-page brief is in substantial compliance in the interests of justice, but for another District Court of Appeals or even another panel of the same District Court of Appeals to decide McIntyre's effort was not substantial enough, discloses the arbitrary nature of this "spirit if not the letter" standard. It is difficult to obtain any statistical data, since one could never know how many 52-page briefs were treated as in substantial compliance, resulting in appeals determined on the merits. Obtaining such data apparently would require searching the case files of each case in each of Texas' fourteen district courts of appeals.

Counsel sought to determine just how many times the *White Budd Van Ness* case, the only published opinion involving dismissal of an appeal in Texas for failure to

comply with a page-limit rule, had been relied upon to justify dismissal. Counsel performed a LEXIS search on the Texas cases database, which would pick up unpublished opinions as well as published opinions. The search produced only one such case dismissal, and it was unpublished – McIntyre's. That the *White Budd Van Ness* case was decided in 1991, and McIntyre's is the only Court of Appeals case in which it has since been applied, suggests that its application is very sporadic and arbitrary. It is possible that unpublished orders dismissing cases for failing to meet the 50-page limit might not cite the *White Budd Van Ness* case, but that seems unlikely, and further searches produced no such cases.

Petitioner possessed a mandatory first right of appeal to the Court of Appeals under applicable provisions of the Texas Constitution and statutes. Dismissal in the

White Budd Van Ness case occurred in the Supreme Court of Texas and involved a discretionary appeal. The provisions of law applicable to McIntyre do not provide for discretionary review in the Courts of Appeals.

All the Texas Court of Appeals need have done in this case was to clarify the rule and its own order by specifying the font size and margins which McIntyre could not divine from the rules or the case relied upon by the court for authority. Surely due process required that the court disclose what the rules were, or exactly what further Petitioner needed to do to comply, and that the court follow its state constitution and statutes with regard to permissible sanctions. Otherwise, appellate review on the merits is granted to some litigants but "capriciously or arbitrarily" denied to others. *Lindsey v. Normet*, 405 U.S. at 77, 92 S.Ct. at 876.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dismissed, Order issued May 29, 1997

[Seal of The State of Texas]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00559-CV

FRANK W. MCINTYRE, Appellant

v.

GEARY & SPENCER, P.C., F/K/A GEARY, STAHL, & SPENCER, P.C., CLEVE CLINTON AND JOHN PALTER, Appellees

OPINION AND ORDER

Before Chief Justice Thomas and Justices Hankinson and Bridges

Appellant's April 18, 1997 "Motion to Reinstate Appellate Brief Filed March 18, 1997 and Motion for Clarification of April 16, 1997 Order and Motion to Extend Time to Submit Conforming Brief if Motion to Reinstate is Denied and Motion to File Brief Containing Twenty Points of Error" is **DENIED**.

On April 16, 1997, after appellant filed three briefs that did not comply with rule 74(h) of the Texas Rules of Appellate Procedure, we ordered appellant to file a fourth brief, by April 26, 1997, in full compliance with the letter and spirit of rule 74(h) of the rules of appellate procedure. As of the date of this order, appellant has not filed a brief. Therefore, we **DISMISS** this appeal.[1] It is **ORDERED** that appellees Geary & Spencer, P.C., f/k/a Geary, Stahl, & Spencer, P.C., Cleve Clinton, and John Palter recover their costs of this appeal from appellant Frank W. McIntyre and from the cash deposit in lieu of appeal bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Frank W. McIntyre.

/s/ Deborah G. Hankinson

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1 *See* TEX. R. APP. P. 60(2); TEX. R. APP. P.74(*l*)(1); *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991).

App. 3

DEBORAH G. HANKINSON
JUSTICE

Do Not Publish
TEX. R. APP. P. 90

Order issued April 16, 1997

[Seal of The State of Texas]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00559-CV

FRANK W. MCINTYRE, Appellant

v.

GEARY & SPENCER, P.C., ET AL., Appellees

ORDER

On September 23, 1996, appellant filed a motion for leave to file a ninety-four page brief. On January 31, 1997, this Court denied appellant's motion and struck appellant's September 23, 1996 brief. Additionally, we instructed appellant

to file a brief in full compliance with the letter and spirit of rule 74(h) of the rules of appellate procedure.

On February 18, 1997, appellant submitted a second brief with a motion requesting this Court to either: (1) determine that the brief conforms to the rules; or (2) file the brief as written. Although appellant reduced the length of his brief to fifty pages, he did so by reducing the print size and the margins. Further, appellant replaced the record citation with footnotes, which referred to an appendix attached to the brief.

On March 3, 1997, we denied appellant's motion and again struck his brief because it did not comply with rule 74(h). We further ordered appellant to file a brief in full compliance with the letter and spirit of rule 74(h) within fifteen days of the date of the order.

On March 18, 1997, appellant submitted a third brief. Like his February 18, 1997 brief, appellant's March 18, 1997 brief has reduced margins. Furthermore, appellant's brief is in

excess of fifty pages. We also note that despite this Court's order directing appellant to reduce the length of his brief, appellant added ten points of error to his brief. Appellant did not file a motion for leave to file the brief. Appellant's March 18, 1997 brief does not comply with the letter or the spirit of rule 74(h).

In *White Budd Van Ness*, the petitioner filed an application for writ of error in excess of fifty pages in violation of rule 131(i) of the rules of appellate procedure. *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991). The supreme court struck the petitioner's application because it exceeded the page limitation prescribed by the rules. The petitioner filed a second application, which again failed to comply with the rules. The supreme court ordered the petitioner to redraw the application. Although the petitioner reduced the length of his third application to fifty pages, it did so only by reducing the print

size and the margins. Because the petitioner's application again violated rule 131(i), the supreme court dismissed it. *Id.*

We directed appellant to *White Budd Van Ness* in our March 3, 1997 order. Like the petitioner in *White Budd Van Ness*, appellant has been given three opportunities to comply with the page limitations of the rules of appellate procedure, but has failed to do so. Although appellant is representing himself pro se in this matter, he is a licensed attorney. By filing a third brief in violation of rul3 74(h), appellant has flagrantly disregarded the rules of appellate procedure and has violated this Court's March 3, 1997 order.

Consequently, on the Court's own motion, we **STRIKE** appellant's March 18, 1997 brief. Appellant is once again **ORDERED** to file a brief in full compliance with the letter and spirit of rule 74(h). Appellant's brief shall be filed within ten days of the date of this order. No extensions will be granted. Appellant is further cautioned that this appeal may be dismissed

if he violates this Court's order and files a brief that does not comply fully with rule 74(h). *See White Budd Van Ness*, 811 S.W.2d at 541.

Appellees' April 2, 1997 motion to extend the time to file a brief is **DENIED** as premature. Appellees' brief is due twenty-five days after appellant files his brief. *See* TEX. R. APP. P. 74(m).

/s/ Deborah G. Hankinson
DEBORAH G. HANKINSON
JUSTICE

Order issued January 31, 1997

[Seal of The State of Texas]
The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00559-CV

FRANK W. MCINTYRE, Appellant

v.

GEARY & SPENCER, P.C., ET AL., Appellees

ORDER

Appellant's September 23, 1996 motion to file appellant brief exceeding page limit is DENIED. Appellant's brief tendered to this Court on September 23, 1996, is STRICKEN. Appellant may pick up his brief from the Clerk's office within thirty days of the date of this order. If appellant fails to do so, the Clerk of the Court may dispose of it.

Appellant may file, within fifteen days of the date of this order, a brief in full compliance with the letter and spirit of

TEX. R. APP. P. 74(h).

Appellant's August 7, 1996 motion to extend the time his brief is **DENIED** as moot.

Appellees' October 3, 1996 motion to extend the time to file their brief is **GRANTED**. Appellees may file their brief on or before the twenty-fifth day after appellant files his brief in compliance with the rule.

/s/ Deborah G. Hankinson
DEBORAH G. HANKINSON
JUSTICE

App. 10

Order issued August 4, 1997

[Seal of the State of Texas]
The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00559-CV

FRANK W. MCINTYRE, Appellant

v.

GEARY & SPENCER, P.C., ET AL., Appellees

ORDER

The Motion for Rehearing filed by appellant **FRANK W. MCINTYRE** on June 13, 1997 is **DENIED**.

/s/ Deborah G. Hankinson
DEBORAH G. HANKINSON
JUSTICE

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 25, 1998

Mr. Frank William McIntyre
3439 Westminster
Dallas, TX 75205

Mr. James Sowder
Thompson Coe Cousins
& Irons
200 Crescent Court,
11th Floor
Dallas, TX 75201

Mr. Wade Caven Crosnoe
Thompson Coe Cousins & Irons
200 Crescent Court, 11th Floor
Dallas, TX 75201-1853

RE: Case Number 97-0817
Style: FRANK W. MCINTYRE
v.
GEARY & SPENCER, P.C., f/k/a GEARY, STAHL & SPENCER, P.C., CLEVE CLINTON and JOHN PALTER

Dear Counsel:

The application for writ of error in the above-styled case was this day denied with the notation, Writ Denied. Motion to supplement record is granted. Motion to strike respondents' supplemental brief is overruled. Justice Hankinson not sitting.

Sincerely,
John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

February 25, 1999

Mr. Frank William McIntyre
3439 Westminster
Dallas, TX 75205

Mr. James Sowder
Thompson Coe
Cousins & Irons
200 Crescent Court,
11th Floor
Dallas, TX 75201

Mr. Wade Caven Crosnoe
Thompson Coe Cousins & Irons
200 Crescent Court, 11th Floor
Dallas, TX 75201-1853

RE: Case Number 97-0817
Style: FRANK W. MCINTYRE
v.
GEARY & SPENDER, P.C., f/k/a GEARY, STAHL & SPENDER, P.C., CLEVE CLINTON and JOHN PALTER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case. (Justice Hankinson not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

IN THE SUPREME COURT OF TEXAS

No. 97-0817

FRANK W. MCINTYRE, PETITIONER

v.

GEARY & SPENDER, P.C., F/K/A GEARY, STAHL & SPENCER, P.C., CLEVE CLINTON, AND JOHN PALTER, RESPONDENTS

ORDER

Because this case has been appealed for delay and without sufficient cause, pursuant to *former* Rule 182(b), Texas Rules of Appellate Procedure, the Supreme Court of Texas orders that respondents are awarded damages in the amount of ONE THOUSAND DOLLARS ($1000.00), as sanctions to be paid by petitioner.

Done at the City of Austin, this 1st day of September, 1998.

(Seal of The State of Texas) John T. Adams, Clerk
Supreme Court of Texas

By /s/ Blanca E. Morin
Blanca E. Morin
Deputy Clerk

(Justice Hankinson not sitting)

Texas Government Code § 22.001

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

Rule 74

B. *BRIEFS AND ARGUMENT IN THE COURTS OF APPEALS*

Rule 74. Requisites of Briefs.

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct district. In civil cases the parties shall be designated as "Appellant" and "Appellee," and in criminal cases as "Appellant" and "Appellee".

(a) Names of All Parties to the Trial Court's Final Judgment. A complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, if any, shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the court of appeals.

(b) Table of Contents and Index of Authorities. The brief shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.

(c) Preliminary Statement. The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in the court. Such statement should seldom exceed one-half page. The details should be reserved

and stated in connection with the points to which they are pertinent.

(d) Points of Error. A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.

(e) Brief of Appellee. The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in civil cases, if the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such manners shall follow substantially the form of the brief for appellant.

(f) Argument. A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set

out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

(g) Prayer for Relief. The nature of the relief sought should be clearly stated.

(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. Each party shall file six copies of his brief in the court of appeals in which the case is pending. Any court of appeals may by rule authorize the filing therein of fewer or more copies of briefs.

(j) Briefs Typewritten or Printed. The brief of either party may be typewritten, or printed. If typewritten, it must be double spaced.

(k) Appellant's Filing Date. Appellant shall file his brief within thirty days after the filing of the transcript and statement of facts, if any, except that in accelerated appeals and habeas corpus appeals appellant shall file his brief within the time prescribed by Rule 42 or Rule 44.

(l) Failure of Appellant to File Brief.

(1) *Civil Cases.* In civil cases, when the appellant has

failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless reasonable explanation is shown for such failure and that appellee has not suffered material injury thereby. The court may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

(2) *Criminal Cases.* [Text Not Reproduced]

(m) Appellee's Filing Dates. Appellee shall file his brief within twenty-five days after the filing of appellant's brief. In civil cases, when appellant has failed to file his brief as provided in this rule, the appellee may, prior to the call of the case, file his brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record.

(n) Modification of Filing Time. Upon written motion showing a reasonable explanation of the need for more time, the court may grant either of both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it.

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

(p) Briefing Rules to Be Construed Liberally. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the

court may require the case to be rebriefed.

(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.

LOCAL RULES OF THE COURTS OF APPEALS
FIFTH COURT OF APPEALS LOCAL RULES

Current with amendments received through 2-1-96

RULE 1:74. REQUISITES OF BRIEFS

(a) General Format. Counsel should carefully follow the requirements of Texas Rule of Appellate Procedure 74 which explains the requisites of briefs. Briefs should be typed on opaque paper no larger than 8½ x 11 inches, bound securely at the left side. A brief longer than twenty-five pages should be bound in such a manner that the open brief will lie flat. All typewriting except block quotations should be double-spaced. Only as much quoted material as may be directly relevant should be included. Proper citation forms as provided by the latest editions of A Uniform System of Citation by Harvard Law Review, and Texas Rules of Form by Texas Law Register should be observed. Writ history and discretionary review history are necessary. In citing cases, specific page citations to the pages where the relevant holdings or quotations may be found should be included.

(b) Page Limit. A brief shall be limited to 50 pages or less, unless leave is obtained from the Court to file a brief in excess of 50 pages. The Court may order rewriting of a brief of more than 50 pages or may consider only the first 50 pages of the brief.

(c) References to Record. When the brief refers to facts or testimony from the transcript or statement of facts, these statements should be followed by a reference to the specific page number in the record where the fact or testimony is found.

(d) Supplemental Briefs. Supplemental briefs may be filed without leave of court only if no new points of error are raised. An amended or reply brief may not be filed without leave of Court.

(e) Failure to File a Brief in a Criminal Case. If no brief has been filed within the time allowed under the Texas Rules of Appellate Procedure or within any extended time granted by the Court, the Clerk notifies counsel for appellant that the brief is overdue and that appellant is to file a brief or proper extension motion within ten days of the date of the notice. If no brief or proper extension motion is filed within that time, the Court directs the trial court to hold a hearing to determine why the brief has not been filed, whether the appellant desires to prosecute the appeal, whether appellant is indigent, or if not indigent, whether retained counsel has abandoned the appeal, and to take such measures as may be necessary to assure effective representation, which may include appointment of new counsel to an indigent appellant. The trial court will be directed to make findings and recommendations and to transmit a record of the proceedings to this Court. Notwithstanding the above, this Court may dispense with a hearing in the trial court if counsel files a motion supported by affidavits or other satisfactory evidence, in conformity with Texas Rule of Appellate Procedure 19(d), which provides the necessary facts regarding appellant's desire to prosecute the appeal, assistance of counsel, and the late brief.

(f) Request for Oral Argument. A party desiring to present oral argument must make a notation to that effect in the upper right-hand corner of the outside cover page to his brief.

(g) Number of Copies. Each party shall file an original plus six copies of each brief.

[Adopted by Court of Appeals to be effective January 1, 1992, approved by Supreme Court February 4, 1992; amended by Court of Appeals September 27, 1993, approved by Supreme Court May 10, 1994.]

TEXAS RULES OF APPELLATE PROCEDURE

Rule 60. Involuntary Dismissal.

(a) Civil Cases.

* * *

(2) If it appears to the appellate court that an appeal or writ of error is subject to dismissal for want of jurisdiction or for failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal or writ of error, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-00559-CV

FRANK W. MCINTYRE, Appellant

v.

GEARY & SPENCER, P.C., ET AL., Appellees

Appeal from the 162nd District Court
of Dallas County, Texas

APPELLANT'S MOTION FOR REHEARING

* * *

Point of Error No. 2 (Restated).

THE COURT ERRED IN STRIKING MCINTYRE'S APPELLATE BRIEF FILED MARCH 18, 1997.

Point of Error No. 3 (Restated).

THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO REINSTATE HIS MARCH 18, 1997 APPELLATE BRIEF.

Point of Error No. 4 (Restated).

THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO CLARIFY THE COURT'S APRIL 16, 1997 ORDER.

Point of Error No. 5 (Restated).

THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO EXTEND TIME TO SUBMIT A CONFORMING BRIEF IF HIS MOTION TO REINSTATE IS DENIED.

The court of appeals should not affirm because of briefing deficiencies. *Inpetco, Inc. v. Te[x]as Am. Bank*, 729 S.W.2d 300, 300 (Tex. 1987) *interpreting* Tex. R. App. P. 83. Before affirming a judgment for failure to abide by rule TRAP 74, the court should order the appellant to re-brief. *Id.* Although the Court ostensibly gave McIntyre a total of three opportunities to re-brief, it did not give him a meaningful opportunity to correct the alleged briefing deficiency upon which the appeal was dismissed. The Court's Orders striking the brief, and ordering re-briefing, were factually erroneous, vague as to the standard under which the brief was deemed deficient, and vague as to the standard by which any subsequent

brief would be evaluated.

It is well settled in that some reasonable standard is essential to the validity of any rule of law. *Texas Antiquities Committee v. Dallas Community College District*, 554 S.W.2d 924, 927-928 (Tex. 1977).

> Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary or discriminatory enforcement is to be prevented, laws must provide explicit standards to those who apply them. Vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attended dangers of arbitrary and discriminatory applications.

Id. Citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

McIntyre has a right to present his case to the Court within the limits of the rules. McIntyre's failure to adequately brief his points of error could result in them being waived. *Olson v. Central Power and Light Co.*, 803 S.W.2d 808, 813 (Tex.App.–Corpus Christi 1991, writ denied). McIntyre had already cut substantial detail, and indeed, entire points of error out of the brief, in order to reduce it to the 50 page limit. Each cut prevented McIntyre from informing the Court of essential aspects of the lower court's numerous errors. Under these circumstances, *Grayned v. City of Rockford* makes it clear that McIntyre has a right to know the exact boundaries of the briefing rules so that he can steer between lawful and unlawful conduct.

The Court's Orders make reference to Rule 74(h) and the case of *White Budd Van Less Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991). Rule 74(h) states no standard for margins, font size, lines per page,

words per line, overall print density, or any other objectively discernable standard by which an appellant, can determine the exact margin requirement. Likewise, *White Budd Van Ness* does not set any standard by which to determine whether any particular font size or margin size is conforming. Neither the Court's Orders of March 3, 1997, April 16, 1997, nor May 29, 1997 specified any standard for margin or font size, or overall print density. Yet the Court struck McIntyre's brief and dismissed McIntyre's appeal for having crossed those undefined boundaries. This is exactly the kind of arbitrary action that the United States Supreme Court sought to prevent in the case of *Grayned v. City of Rockford*.

The motion to clarify asked two simple questions. These were: 1) what specifically do you find deficient about the brief and by what standard is that deficiency measured; and 2) how big do you want the margins in any future brief? The court's refusal to clarify the deficiency or the standard upon which the

brief was deemed deficient amounts to a refusal to reveal its reasoning in overruling points of error. *Lujan v. Houston Gen. Life Ins. Co.*, 756 S.W.2d 295, 296 (Tex. 1988). Failing to do so undermines the purpose of issuing opinions, which is to inform the court and the parties of the court's reasoning. *Id.*

Rules 74(p) provides that the briefing rules are to be interpreted liberally. "[A] substantial compliance with these rules will suffice in the interest of justice." 94(p) Tex. R. App. P. The Court may require rebriefing only for "flagrant violation of this rule." *Id.* Given the vagueness of the rule, McIntyre's good faith effort to obtain clarification and comply with the rule, and the court's refusal to clarify the rule, it is arbitrary and unreasonable to find that McIntyre flagrantly violated the rule.

* * *

No. 97-0817

IN THE SUPREME COURT OF TEXAS

FRANK W. MCINTYRE, PETITIONER

v.

GEARY & SPENDER, P.C., F/K/A GEARY, STAHL & SPENCER, P.C., CLEVE CLINTON, AND JOHN PALTER, RESPONDENTS

Appeal from the Fifth Court of Appeals
at Dallas

APPLICATION FOR WRIT OF ERROR

* * *

Point of Error No. 2. (Restated).
THE COURT ERRED IN STRIKING MCINTYRE'S HIS MARCH 18, 1997 APPELLATE BRIEF BECAUSE THE STANDARD BY WHICH THE COURT FOUND THAT THE BRIEF DID NOT CONFORM TO RULE 74(h) IS UNCONSTITUTIONALLY VAGUE. (Germane to point of error 2 in petitioner's motion for rehearing).

Point of Error No. 3. (Restated).
THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO REINSTATE HIS MARCH 18, 1997 APPELLATE BRIEF BECAUSE STRIKING THE BRIEF WAS CONTRARY TO RULE 74(p). (Germane to point of error 3 in petitioner's motion for rehearing).

Point of Error No. 4 (Restated).
THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO CLARIFY THE COURT'S APRIL 16, 1997 ORDER BECAUSE THE STANDARD THAT THE COURT ORDERED MCINTYRE TO COMPLY WITH WAS UNCONSTITUTIONALLY VAGUE ABSENT CLARIFICATION. (Germane to point of error 4 in petitioner's motion for rehearing).

Point of Error No. 5 (Restated).
THE COURT ERRED IN DENYING MCINTYRE'S MOTION TO EXTEND TIME TO SUBMIT A CONFORMING BRIEF IF HIS MOTION TO REINSTATE IS DENIED BECAUSE IT IS CONTRARY TO THE LETTER AND SPIRT OF TRAP 83. (Germane to point of error 5 in petitioner's motion for rehearing).

Point of Error No. 6. (Restated).
THE COURT ERRED IN DISMISSING MCINTYRE'S APPEAL FOR BRIEFING DEFICIENCIES WITHOUT GIVING MCINTYRE AN OPPORTUNITY TO AMEND BECAUSE IT IS CONTRARY TO THE LETTER AND SPIRIT OF TRAP 83 (Germane to point of error 5 in petitioner's motion for rehearing).

Arguments and Authorities in Support of Points of Error 2 through 6.

The court of appeals should not affirm because of briefing deficiencies. *Inpetco, Inc. v. Te[x]as Am. Bank*, 729 S.W.2d 300, 300 (Tex. 1987) *interpreting* Tex. R. App. P. 83.

Before affirming a judgment for failure to abide by TRAP 74, the court should order the appellant to re-brief. *Id.* Although McIntyre filed three briefs, the appeals court did not give him a meaningful opportunity to correct the alleged briefing deficiency upon which the appeal was dismissed. The Order striking the brief, and ordering re-briefing, was factually erroneous, vague as to the standard under which the brief was deemed deficient, and vague as to the standard by which any subsequent brief would be evaluated. No specific standard exists for margin or font size.

It is well settled in that some reasonable standard is essential to the validity of any rule of law. *Texas Antiquities Committee v. Dallas Community College District*, 554 S.W.2d 924, 927-928 (Tex. 1977).

> Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

> Second, if arbitrary or discriminatory enforcement is to be prevented, laws must provide explicit standards to those who apply them. Vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attended dangers of arbitrary and discriminatory applications.

Id. citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

McIntyre has a right to present this case within the limits of the rules. McIntyre's failure to adequately brief hi points of error could result in them being waived. *Olson v. Central Power and Light Co.*, 803 S.\w.2d 808, 813 (Tex.App.–Corpus Christi 1991, writ denied). McIntyre had already cut substantial detail, and indeed, entire points of error out of the brief, in order to reduce it to the 50 page limit. Each cut prevented McIntyre from informing the court of essential aspects of the lower court's numerous errors. Under these circumstances, *Texas Antiquities* and *Grayned v. City of Rockford* make it clear that McIntyre has a right to know the exact boundaries of the

briefing rules so that he can steer between lawful and unlawful conduct.

The Order made reference to Rule 74(h) and the case of *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991). Rule 74(h) states no standard for margin, font size, lines per page, words per line, overall print density, or any other objectively discernable standard by which an appellant can determine the margin requirement. Likewise, *White Budd Van Ness* does not set any standard any which to determine whether any particular font size or margin size is conforming. Neither the court's Orders of March 3, 1997, April 16, 1997, nor May 29, 1997 specified any standard for margin or font size, or overall print density. Yet the Court struck McIntyre's brief and dismissed McIntyre's appeal for having crossed those undefined boundaries.

The motion to clarify asked three simple questions. These were: 1) what specifically does the court find deficient

about the brief; 2) by what standard is that deficiency measured; and 3) how big must I make the margins in any future brief? In light of the fact that failure to conform to a margin requirement formed the basis for striking the brief and dismissing the appeal, and that neither Rule74(h) or the cases interpreting it specify a font or margin requirement, the appeals court's refusal to clarify those requirements is an abuse of discretion. The appeals court's action is exactly the kind of arbitrary action that this Court held to be unlawful in *Texas Antiquities* and the United States Supreme Court sought to prevent in the case of *Grayned v. City of Rockford*.

The court's refusal to the deficiency or the standard upon which the brief was deemed deficient also amounts to a refusal to reveal its reasoning in violation of the principles set forth in *Lujan*. The court of appeals must reveal its reasoning in overruling points of error. *Lujan v. Houston Gen. Life Ins. Co.*, 756 S.W.2d 295, 296 (Tex. 1988). Failing to do so undermines

the purpose of issuing opinions, which is to inform the court and the parties of the court's reasoning. *Id.*

Furthermore, Rule 74(p) provides that the briefing rules are to be interpreted liberally "[A] substantial compliance with these rules will suffice in the interest of justice." 74(p) Tex. R. App. P. The Court may require rebriefing only for flagrant violation of this rule." *Id.* Given the vagueness of the rule, McIntyre's good faith effort to obtain clarification and comply with the rule, and the court's refusal to clarify the rule, it is arbitrary and unreasonable to find that McIntyre flagrantly violated the rule. Dismissal of McIntyre's appeal is wholly inconsistent with the above cited cases and rules of appellate procedure.

App. 37

No. 97-0817

IN THE SUPREME COURT OF TEXAS

FRANK W. MCINTYRE, PETITIONER

v.

GEARY & SPENDER, P.C., F/K/A GEARY, STAHL & SPENCER, P.C., CLEVE CLINTON, AND JOHN PALTER, RESPONDENTS

PETITIONER'S MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT:

Petitioner, Frank McIntyre ("McIntyre") requests the Court to reconsider its denial of the petition for review and award of delay sanctions.

ISSUES PRESENTED

Issue 1. *The Supreme Court should have granted the petition because McIntyre's appellate brief substantially complies with the briefing requirements of (old) TRAP 74(p) under which the brief was filed.*

Issue 2. *The Supreme Court's award of a*

damages sanction is not justified and violates the TRAP 63 requirement that it must issue a reasoned opinion explaining the award.

ARGUMENT

As the record in this case shows, McIntyre made good faith efforts to determine and comply with the briefing requirements that serve as the only basis for dismissal of his appeal. McIntyre's appellate brief complies with the letter and the spirit of the Rules of Appellate Procedure. And both the letter and spirit of those rules simply do not allow this appeal to be dismissed for failure to comply with a non-existent margin requirement. Tex. R. App. P. 83 (now 44.3).

Even more egregious is the appeals court's denial of McIntyre's motion for clarification of the margin sizes, combined with its dismissal of the appeal for failure to comply with a non-existent standard. Old Rule 74(h), which McIntyre is alleged to have violated the spirit of, is simply too vague to withstand constitutional muster under either TEX. CONST. ART.

I, § 19 or the U.S. Const. amend. XIV. "Substantive due process demands that a statute shall not be unreasonable, arbitrary, or capricious and the means selected by the statute shall have a real and substantial relation to the object sought to be obtained." *Chandler v. Jorge A. Guitierrez [Gutierrez?], P.C.*, 906 S.W.2d 195, 202 (Tex. App.–Austin 1995, writ denied). "A statute which either forbids or requires the doing of an act in terms os vague that persons of common intelligence must guess its meaning and differ as to its application lacks the first essential of due process of law." *Id. citing Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Texas Antiquities v. Dallas Community College District*, 554 S.W.2d 924, 927-8 (Tex. 1977).

"Vague laws impermissibly delegate basic polic matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attended dangers of arbitrary and discriminatory applications." *Texas Antiquities v. Dallas*

Community College District, 554 S.W.2d 927-8 (Tex. 1977) *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972). "Arbitrariness is a signal characteristic of a violation of substantive due process." *Ford Motor Co. v. Tyson*, 943 S.W.2d 527, 534 (Tex. App.–Dallas 1997, orig. proceeding) *citing Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956).

This Court's unexplained denial of McIntyre's writ of error degrades the quality of Texas justice by supporting the exercise of abusive judicial power that allows appellate courts to affirm judgments of the lower courts based on unconstitutionally vague technical minutia. In so doing the court violates the due process and equal protection clauses of 14th Amendment to the United States Constitution and the due course of law provisions of the Texas Constitution.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

May 27, 1999

Mr. Marc W. Taubenfeld
McGuire Craddock Strother
500 N. Akard St., Suite 3550
Dallas, TX 75201

Re: Robert Milbank, Jr., Chapter 7
Bankruptcy Trustee for the Estate of
Frank W. McIntyre
v. Geary & Spencer, et al.
Application No. A-990

Dear Mr. Taubenfeld:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on May 27, 1999, extended the time to and including July 25, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTIFICATION LIST

Mr. Marc W. Taubenfeld
McGuire Craddock Strother
500 N. Akard St., Suite 3550
Dallas, TX 75201

Mr. Eliet Shavin
4311 Oak Lawn Avenue
Suite 333
Dallas, TX 75219

Mr. Jim Sowder
Thompson Coe Cousins & Irons
200 Crescent Court, 11th Floor
Dallas, TX 75202

Mr. Robert Milbank Jr.
500 N. Akard, Suite 3960
Dallas, TX 75201

Clerk
Court of Appeals of Texas,
Fifth District
600 Commerce Street
Dallas, TX 85202-4658

No. 94-03347-I

FRANK W. MCINTYRE	:	**IN THE DISTRICT**
Plaintiff	:	**COURT OF**
vs.		
GEARY & SPENCER,	:	**OF DALLAS**
P.C. F/K/A, GEARY,	:	**COUNTY, TEXAS**
STAHL, & SPENCER,	:	
P.C.	:	
CLEVE CLINTON	:	
JOHN PALTER	:	**162ND JUDICIAL**
Defendants	:	**DISTRICT**

PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT
or in the alternative
MOTION FOR NEW TRIAL

TO THE HONORABLE BILL RHEA:

Plaintiff Frank W. McIntyre, requests the Court enter a judgment notwithstanding the verdict in favor of McIntyre or in the alternative to grant a new trial in the above referenced matter to provide McIntyre with equal protection under the law and in the interest of justice and fairness.

I
PROCEDURAL POSTURE

1. This is a legal malpractice suit, Plaintiff, Frank McIntyre ("McIntyre") sued his former attorneys, John Palter

("Palter") and Cleve Clinton ("Clinton") of the law firm of Geary & Spender, f/k/a Geary, Stahl, & Spencer, P.C. ("G&S") under theories of negligence, gross negligence, negligent misrepresentation, breach of fiduciary duty, and deceptive trade practices. McIntyre's allegations are set forth in Plaintiff's Second Amended Petition. G&S counterclaimed for attorney fees under a contingency fee agreement entered into between the parties during the course of the underlying lawsuit.

2. After a two week jury trial beginning the week of November 27, 1995, the Court submitted the matters to the jury.

3. The jury returned a verdict answering "no" as to whether the Clinton, Palter or G&S were negligent, grossly negligent, breached their fiduciary duties, made negligent misrepresentations, or engaged in deceptive trade practices during their representation of McIntyre in the underlying suit. The jury did not reach the damages issue. The jury also returned a verdict of "no" as to Clinton's, Palter's and G&\s's affirmative defenses of contributory negligence and waiver of McIntyre.

4. The jury found in favor of G&S on its counterclaim for attorney fees and awarded them $10,058.67 on the counterclaim plus additional attorney fees to collect the contract. The jury answered "no" to McIntyre affirmative defenses to G&S's counterclaim.

5. On January 5, 1996 the Court signed a final judgment.

II
FACTS

6. Clinton and Palter represented McIntyre in a suit for an accounting and partnership dissolution ("the underlying suit") filed in the 162nd District Court, Dallas, Texas in 1987. McIntyre sought to recover his capital investment, goodwill value, out of pocket expenses, share of partnership income, and any other damages to which McIntyre was legally entitled to recover from Steve Sliman ("Sliman") or SLS Consulting ("SLS") in the underlying suit. Sliman and McIntyre had been partners in an information systems consulting business known as Nova Information Systems ("Nova") before Sliman unilaterally dissolved the partnership and took partnership assets to operate a virtually identical business, SLS. McIntyre claimed a partnership interest in SLS due to the fact that Sliman started and operated SLS with tangible and intangible assets of Nova without first paying Nova's creditors and repaying McIntyre's tangible and intangible capital contributions to Nova and SLS.

7. The evidence shows that Clinton and Palter took McIntyre's underlying partnership dispute to an arbitration in 1990 without discovering or presenting evidence of approximately $700,000 in revenue and $500,000 in net income that Sliman and SLS generated using partnership assets between February 1986 and February 1990. The reports and schedules prepared by the accounting firm of King-Burns, P.C. in the malpractice suit (Plaintiff's 64, ("the King reports")), McIntyre alleges that Clinton's and Palter's failure to conduct such an accounting during the underlying suit fell below the standard of care for a reasonable and prudent attorney handling a partnership dissolution and accounting case and that the failure to conduct the accounting was the proximate cause of $436,736 in damages to McIntyre.

8. The King firm's reviews began with the business records of Nova from the date it was formed as a sole proprietorship by McIntyre in 1982. Mr. King's reports also show the capital contributions of McIntyre and Sliman to Nova when Nova became a partnership on June 1, 1985 and also shows the revenue, expenses, accumulated income, assets, liabilities and capital balances of the partners just prior to and just after Sliman dissolved the partnership on February 21, 1986. Mr. King also reviewed and reported on expense McIntyre incurred to wind up the affairs of Nova after February 21, 1986. The King firm also reviewed the business records of SLS Consulting from February 21, 1986 though December 1990.

* * *

No. 05-96-00559-CV

FRANK W. MCINTYRE	§	
Appellant	§	
	§	
vs.	§	
	§	
GEARY & SPENCER,	§	**IN THE FIFTH**
P.C., f/k/a GEARY,	§	**DISTRICT**
STAHL, & SPENCER,	§	**COURT OF**
P.C.	§	**DALLAS**
CLEVE CLINTON	§	
JOHN PALTER	§	
Appellees		

APPELLANT'S MOTION TO FILE APPELLANT'S BRIEF EXCEEDING PAGE LIMIT

TO THE HONORABLE COURT OF APPEALS:

Appellant, Frank W. McIntyre, in accordance with Tex. R. App. P. 74(f) requests permission to file an appellate brief which exceeds the 50 page limit imposed by Tex. R. App. P. 74(h). One copy of the brief has been filed with the Court and one copy has been served upon opposing counsel pending a ruling on this motion.

1. This is an appeal from a legal malpractice suit which stems from an underlying suit for an accounting and dissolution of partnership. The trial of this suit lasted ten days and the Statement of Facts consists of eleven volumes covering the testimony of twelve witnesses. The Transcript contains over 300 pages covering a wide variety of pretrial motions, orders, and issues. The issues in this case are complex an the briefing

must cover both the issues in the underlying suit and the legal malpractice suit. The amount of money involved is several hundred thousand dollars.

2. The defendant's in this case have attacked McIntyre's right to recover damages in the underlying suit, thus necessitating extensive briefing of McIntyre's right to recover damages in the underlying suit.

3. McIntyre is pro se in this appeal. In light of the quantity and complexity of the issues, McIntyre has been unable to condense the facts and discussion of issues into the fifty page limit.

4. This motion is not made for the purpose of delay or to unduly burden the Court or opposing parties or unfairly prejudice the opposing parties. The motion is brought so that McIntyre can properly brief the Court on the legal issues it must decide so that justice may be served.

WHEREFORE PREMISES CONSIDERED, McIntyre requests the Court to accept McIntyre's Appellate Brief, as is. In the alternative, McIntyre request a 15 day extension of time from the denial of this motion to condense the brief so that it conforms to the 50 page limit.

Respectfully submitted,

/s/ Frank W. McIntyre
Frank W. McIntyre
Pro Se
3439 Westminster
Dallas, Texas 75205

(214) 691-1638
(214) 691-3009 Fax

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been served on all counsel of record by fax transmission in accordance with the Texas Rules of Civil Procedure on this the 23rd day of September 1996.

/s/ Frank W. McIntyre
Frank W. McIntyre

VERIFICATION

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared FRANK MCINTYRE, who stated upon hi oath and after being duly sworn by me the following: "My name is FRANK MCINTYRE. I am over 21 years of age and am fully competent to testify to the matters stated herein. The statements of fact contained in this Motion are true based on my personal knowledge or based on information I have received from the offices of the Clerk of the District Court and the Clerk of the Court of Appeals.

/s/ Frank W. McIntyre
Frank W. McIntyre

SWORN TO and SUBSCRIBED before me by Frank W. McIntyre on this 23rd day of September, 1996.

/s/ Christy Daniel
Christy Daniel
Notary Public in and for
Dallas County, Texas

My Commission Expires:
04-08-00

NO. 05-96-00559-CV

IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

FRANK W. MCINTYRE
Appellant

vs.

GEARY & SPENCER, P.C. f/k/a GEARY, STAHL & SPENCER, P.C., CLEVE CLINTON and JOHN PALTER
Appellees

ON APPEAL FROM THE 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

APPELLEES' RESPONSE TO APPELLANT'S MOTION TO FILE BRIEF EXCEEDING PAGE LIMIT

Appellees file this Response to Appellant's Motion to File Brief Exceeding Page Limit and would show this Court the following:

1. On September 23, 1996, appellant McIntyre filed his **94 page** appellate brief, as well as his Motion to File Brief Exceeding Page Limit. In the event the court overrules his

motion, appellant requested a 15 day extension of time from the overruling of the motion to condense the brief to conform to the 50 page limit.

2. Briefs in civil cases should not exceed 50 pages. TEX. R. APP. P. 74(h). This Court may order rewriting of a brief of more than 50 pages or may consider only the first 50 pages of the brief. 5th Tex.App. (Dallas) Loc.R. 1.74(b).

3. This Court should deny appellant's motion. A cursory review of appellant's brief reveals its spectacular redundancy. The factual background in the brief is itself 40 pages long, and those facts are then repeated *ad nauseam* in the argument portion of the brief. Additionally, it is clear from the length of the brief (94 pages) that appellant made absolutely no effort to comply with the 50 page limit. And although appellant portrays the trial as a long and complex proceeding with "several hundred thousand dollars" in controversy, the trial was not extremely lengthy (it lasted ten days), and the jury awarded

only approximately $10,000 in damages, on appellees' counterclaim.

4. Appellant also attempts to rely on his *pro se* status as an excuse for not complying with the Rules of Appellate Procedure. It is well settled, however, that *pro se* litigants are held to the same standard as licensed attorneys and must comply with all applicable laws and rules of procedure. *See Lavada Hughes & Occupants v. Habitat Apartments*, 880 S.W.2d 5, 9 (Tex.App.–Dallas 1992), *rev'd on other grounds*, 860 S.W.2d 872 (Tex. 1993); *Kanow v. Brownshadel*, 691 S.\w.2d 804, 806 (Tex.App.–Houston [1st Dist.] 1985, no writ).

5. Appellees also note that appellant's brief was initially due on August 7, 1996, but appellant filed a motion to extend time to file his brief for 45 days, or until September 23, 1996. This court has not yet ruled on appellant's motion to extend time. Appellees request a ruling on that motion because appellant's brief was not timely filed if the Court overrules that

motion.

6. For these reasons, appellees respectfully request that the Court overrule Appellant's Motion to File Brief Exceeding Page Limit. Appellees further request that the Court order appellant to condense his brief to 50 pages or less or, pursuant to Rule 1.74(b) of the Local Rules, only consider the first 50 pages of appellant's brief. Appellees also request such other and further relief to which they are justly entitled.

Respectfully submitted,

By: /s/ James L. Sowder
James L. Sowder # 18863900
Wade Crosnoe # 00783903

THOMPSON, COE, COUSINS & IRONS, L.L.P.
200 Crescent Court, 11th Floor
Dallas, Texas 75201-1840
Telephone: (214) 871-8200
Telecopy: (214) 871-8209

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the preceding document has been served in accordance with the Texas Rules of Appellate Procedure on this 3rd day of October, 1996:

Mr. Frank McIntyre
Plaintiff, pro se
3439 Westminster
Dallas, Texas 75205

By: /s/ James Sowder
James Sowder

No. 05-96-00559-CV

FRANK W. MCINTYRE	§	
Appellant	§	
	§	
vs.	§	
	§	
GEARY & SPENCER,	§	**IN THE FIFTH**
P.C., f/k/a GEARY,	§	**DISTRICT**
STAHL, & SPENCER,	§	**COURT OF**
P.C.	§	**DALLAS**
CLEVE CLINTON	§	
JOHN PALTER	§	
Appellees		

APPELLANT'S MOTION TO DETERMINE THAT BRIEF CONFORMS TO THE RULES AND IN THE ALTERNATIVE MOTION TO FILE BRIEF EXCEEDING PAGE LIMIT AND IF NECESSARY MOTION TO EXTEND TIME TO WRITE CONFORMING BRIEF

TO THE HONORABLE COURT OF APPEALS:

1. In September 1996, Appellant Frank W. McIntyre, originally filed his Appellate Brief along with a Motion to File Brief Exceeding Page Limit. The Brief filed in September was ninety four (94) pages long, due to the number and complexity of the issues involved.

2. On January 31, 1997, the Court denied the Motion, and Ordered McIntyre to writ a new Brief that conformed to the letter and the spirit of the Rules of Appellate Procedure. The Order granted McIntyre 15 days to rewrite the Brief.

3. In accordance with the Order, McIntyre has filed his new Brief which appears to conform to the letter and spirit of the Rules. The main part of the Brief, that is the summary of the case, statement of facts, and the argument and authorities sections, have been reduced to forty nine (49) pages. The Brief contains additional pages, such as the table of contents, index of authorities, points of error, appendix of record references, certificate of service, and rule 74 certificate which appear not to count toward the 50 page limit under the Rules.

4. Rule 74(h) states that the 50 page limit is exclusive of "the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc." By using the term "etc.", Rule 74(h) suggests that pages in the

Brief which are not part of the summary, facts, or argument sections are excepted from the fifty page limit. If this is the case, then McIntyre's Brief is within the Rules.

5. Since the Court's Order requires McIntyre to file a conforming Brief, McIntyre requests the Court to determine that his Brief conforms to the Rules and in the alternative requests the Court to accept the Brief as written.

6. In making this request, McIntyre points out that this is a legal malpractice suit stemming from prior litigation. The issues in this appeal embrace the issues in two lawsuits. The Defendant/Appellee's prevailed in the trial court on the defense that the inherent weaknesses of the underlying case caused them to handle the matter the way they did. McIntyre's Brief, therefore, not only requires briefing the malpractice issues, but also briefing to show that the alleged weakness in the underlying suit did not really exist, but that Defendant/Appellee's merely fabricated tem after the fact to excuse their conduct.

7. McIntyre also points out that the main part of the Brief makes liberal use of headings and subheadings which facilitate easier reading and comprehension. McIntyre's first Brief was 94 pages long, and reducing the current brief to 49 pages required cutting out many important details. Requiring further reductions, would require eliminating not only the details, but would also require eliminating those headings and subheadings. More importantly, it would require eliminating facts and arguments that are essential to seeing that justice is done in this appeal.

WHEREFORE PREMISES CONSIDERED, McIntyre request the Court to determine that his Brief conforms to the Rules, and in the alternative to accept his Brief as written. In the alternative, McIntyre request a 15 day extension of time from the denial of this motion to further condense the Brief.

Respectfully Submitted,

/s/ Frank W. McIntyre

Frank W. McIntyre
State Bar # 00797047
Appellant, Pro se
3439 Westminster
Dallas, Texas 75205
(214) 691-1639
(214) 691-3009 Fax

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been served on all counsel of record by fax transmission in accordance with the Texas Rules of Civil Procedure on this the 18th day of February, 1997.

/s/ Frank W McIntyre
Frank W. McIntyre

No. 05-96-00559-CV

FRANK W. MCINTYRE	§	
Appellant	§	
	§	
vs.	§	
	§	
GEARY & SPENCER,	§	**IN THE FIFTH**
P.C., f/k/a GEARY,	§	**DISTRICT**
STAHL, & SPENCER,	§	**COURT OF**
P.C.	§	**DALLAS**
CLEVE CLINTON	§	
JOHN PALTER	§	
Appellees		

APPELLEES' RESPONSE TO APPELLANT'S MOTION AND APPELLEES' MOTION TO STRIKE APPELLANT'S BRIEF

Appellees file this (1) Response to Appellant's Motion and (2) Appellees' Motion to Strike Appellant's Brief and would show this court the following:

1. Appellant Frank McIntyre filed a 94-page brief along with a Motion For Leave to File Brief Exceeding Page Limit on September 23, 1996. After this court overruled the motion and ordered McIntyre to file a brief "in full compliance with the

letter and spirit" of Texas Rule of Appellate Procedure 74(h), McIntyre filed on February 17, 1997 a brief ostensibly 49 pages in length. McIntyre also filed a Motion to Determine that Brief Conforms to the Rules and In the Alternative Motion to File Brief Exceeding Page Limit and If Necessary Motion to Extend Time to Write Conforming Brief ("McIntyre's Motion"). In McIntyre's Motion, he notes that his brief "appears to" comply with the letter and spirit of the Rules of Appellate Procedure.

2. McIntyre's brief in no way complies with the letter and spirit of Rule 74. It is obvious that McIntyre cut his brief to 49 pages by reducing the font size and shrinking the margins. Such tactics violate the spirit of Rule 74. *See White Budd Van Ness Partnership v. Major-Galdys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991) (holding that although an Application for Writ of Error of less than 50 pages technically complied with Rule 131(i) of the Rules of Appellate Procedure, the application violated the spirit of Rule 131(i) because its small print size and

margins rendered the application difficult to read), *cert. denied* 502 U.S. 861 (1991). Additionally, McIntyre's brief does nto comply with the letter of Rule 74(f), which requires the brief to contain a Statement of Facts with reference to the pages in the record where the fact in question may be found. *See* Tex. R. App. P. 74(f). McIntyre's Statement of Facts contains no direct cites to the appellate record, but instead contains footnotes referring to a nine page appendix that reflect the actual record cites. McIntyre does not count the appendix as part of his brief.

3. McIntyre concedes that his brief does not comply with Rule 74 by filing his motion. Why else would he file a Motion to Determine that Brief Conforms to the Rules nad in the Alternative Motion to File Brief Exceeding Page Limit and If Necessary Motion to Extend Time to Write Conforming Brief? McIntyre's Motion confirms the obvious: McIntyre has intentionally violated this Court's order and repeatedly and intentinoally violated the Rules of Appellate Procedure. As

indicated by the inclusion of his state bar number on the cover of his brief, McIntyre is now a member of the State Bar of Texas and has no excuse for his conduct.

4. Based upon McIntyre's intentional and repeated disregard of this Court's order and the Rules of Appellate Procedure, this Court should deny McIntyre's Motion. Furthermore, McIntyre's appeal is subject to dismissal for McIntyre's failure to comply with the Rules of Appellate Procedure and the Court order. *See* Tex. R. App. 60(a)(1). This Court should strike McIntyre's brief and affirm the trial court's judgment and enter judgment for appellees' costs on McIntyre's cash deposit. *See* Tex. R. App. P. 60(a)(1); *Bainbridge v. Bainbridge*, 662 S.W.2d 655 (Tex. App.–Dallas 1983, no writ) (affirming trial court's judgment and assessing damages against appellant based on appellant's failure to file Statement of Facts and brief). Alternatively, this Court should strike the brief and dismiss the appeal. *See* Tex. R. App. P.

60(a)(a); *White Budd Van Ness Partnership*, 811 S.W.2d at 541 (dismissing Application for writ of Error because it violated the spirit of Rule 131(i)).

PRAYER

5. For these reasons, appellees respectfully request that the Court overrule McIntyre's Motion. Additionally, appellees respectfully request that the Court strike McIntyre's brief and affirm the judgment of the trial court and also enter judgment for costs on McIntyre's cash deposit. Alternatively, appellees respectfully request that the Court strike McIntyre's brief and dismiss the appeal.

Respectfully submitted,

By: /s/ Wade Crosnoe
James L. Sowder # 18863900
Wade Crosnoe # 00783903

THOMPSON, COE, COUSINS
& IRONS, L.L.P.
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Dallas, Texas 75201-1853
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Telecopy: (214) 871-82009

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served in accordance with the Texas Rules of Appellate Procedure on the following party on this 20th day of February, 1997.

Mr. Frank McIntyre
3439 Westminster
Dallas, Texas 75205

By: /s/ Wade Crosnoe
Wade Crosnoe

No. 05-96-00559-CV

FRANK W. MCINTYRE	§	
Appellant	§	
	§	
vs.	§	
	§	
GEARY & SPENCER,	§	**IN THE FIFTH**
P.C., f/k/a GEARY,	§	**DISTRICT**
STAHL, & SPENCER,	§	**COURT OF**
P.C.	§	**DALLAS**
CLEVE CLINTON	§	
JOHN PALTER	§	
Appellees		

APPELLANT'S MOTION TO REINSTATE APPELLATE BRIEF FILED MARCH 18, 1997 AND MOTION FOR CLARIFICATION OF APRIL 16, 1997 ORDER AND MOTION TO EXTEND TIME TO SUBMIT CONFORMING BRIEF IF MOTION TO REINSTATE IS DENIED AND MOTION TO FILE BRIEF CONTAINING TWENTY POINTS OF ERROR

TO THE HONORABLE COURT OF APPEALS:

Appellant Frank W. McIntyre ("McIntyre") respectfully makes this Motion in response to the Court's *sua sponte* Order of April 16, 1997. By this Motion McIntyre seeks to reinstate his Appellate Brief, filed March 18, 1997, because it conforms to the letter and spirit of the Texas Rules of Appellate

Procedure. In the event the Motion to Reinstate is denied, McIntyre requests the Court to clarify the deficiency it perceives sin McIntyre's March 18, 1997 Brief, and set forth a clear standard with the Rules. If the Motion to Reinstate is denied, McIntyre further requests an extension of time to file a conforming Brief of at least 30 days from the date of denial of the Motion to Reinstate or issuance of a clarifying Order, whichever comes last. In the event the Motion to reinstate is denied, McIntyre further requests leave to file a Brief containing the points of error set forth in McIntyre's March 18, 1997 Brief, if such leave is necessary.

BACKGROUND

On April 17, 1997 McIntyre, received the Court's Order dated April 16, 1997 in which the Court, on its own Motion, struck McIntyre's Appellant Brief filed March 18, 1997, and gave him ten days to rebrief. The Court found that the Brief failed to conform to the letter and spirit of Rule 74(h) Tex. R.

App. P. The Order further found that McIntyre flagrantly violated the Court's Order of March 3, 1997, which also Ordered McIntyre to file a brief that conformed to the letter and spirit of Rule 74(h).

The Court's April 16, 1997 Order specifically found that McIntyre's March 18, 1997 Brief: 1) exceeds the fifty-page limt of Rule 74(h); and 2) has reduced margins. The Order notes that McIntyre added ten points of error to his Brief, and suggests that the addition of the ten points of error further violated the Court's Order to shorten the Brief.

McIntyre denies he flagrantly disregarded the Rules of Appellate Procedure or that he intentionally violated the Court's March 3, 1997 Order. McIntyre filed his March 18, 1997 Brief in the good faith belief that it fully conforms to the letter and spirit of Rule 74(h). The Court's Orders erroneously found that McIntyre used a reduced font size. All Briefs have used the same font size, which is Microsoft Word's standard 12 point

Times New Roman. The Briefs font and margin sizes are the same as in this Motion. McIntyre admits his February 18, 1997 Brief used footnotes to reference the record and, including the footnotes, McIntyre's February Brief exceeded the fifty-page limit. However, McIntyre's March 18, 1997 Brief corrected that problem by using in context references to the record. The March Brief is forty-eight pages, not including the pages excluding from the count under Rule 74(h).

To meet the fifty-page limit, McIntyre did not simply reduce the font and margin size as alleged by Appellees and the Court. McIntyre substantially re-organized his brief, restated multifarious points of error, reduced the recital of facts, cut out redundancies, and genuinely attempted to conform to the letter and spirit of Rule 74(h). The Court's note that McIntyre added ten points of error reveals that the Court has not looked closely at the points of error. Careful examination reveals the additional points of error are merely re-stated forms of the points of error

submitted in McIntyre's September and February Briefs. McIntyre in fact eliminated one of his original points of error. Furthermore, since the Court struck McIntyre's previous Briefs upon the Motion of opposing parties, McIntyre's March 18, 1997 Brief is the first Brief on the record. As such, it does not require leave from the Court to amend the points of error or anything else, so long as it conforms to Rule74(h) and (p).

Finally, McIntyre has other activities, including a long planned 10-day out of town trip with his family beginning April 19, 1997 through April 28, 1997. McIntyre then has law school finals beginning April 30, 1997 and lasting through May 9, 1997. Requiring McIntyre to re-brief by April 26, 1997 would impose an unfair burden on McIntyre and his family, and is a practical impossibility. McIntyre could submit a new Brief by May 20, assuming McIntyre had a clarifying Order by May 10, 1997.

ARGUMENT

The Court's April 16, 1997 Order first alleges that McIntyre's brief exceeds the fifty-page limit. Rule 74(h) requires that the appellate brief "shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc." 74(h) Tex. R. App. P. The cover pages of the Brief, the table of contents, table of authorities, and statement of names and addresses of the parties are numbered with Roman Numerals at the front of the Brief. They do not contain any pages that should be included in the 50-page limit. The main body of the Brief is numbered with Arabic numerals as pages 1 through 53. However, pages 2 through 5 merely state the points of error, and under Rule74A(h) are excepted from the 50-page limit. Page 53 is the Certificate of Service, which is also excepted from the 50-page limit. That leaves at most 48 pages

that count toward the page limit. The Court appears to have erred, either in counting the pages, or by including in the count pages which are excluded under Rule74(h). If the Court is of the opinion that it did not err in its count, McIntyre respectfully requests the Court to point out with particularity which pages it deems to be included in the count.

The Court's April 16, 1997 Order next found that McIntyre's Brief contains reduced margins. However, the Court states no standard by which it made that determination. The Court's Orders make reference to Rule74(h) and the case of *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991). Rule 74(h) states no standard for margins, font size, lines per page, words per line, or any other discernable standard by which McIntyre, or any other appellant, can objectively determine whether his Brief conforms to a margin requirement. Likewise, *White Budd Van Ness* does not set any standard by which to determine

whether any particular font size or margin size is conforming. Neither the Court's March 3, 1997 Order, nor its April 16, 1997 Order, specified any standard for margin or font size.

White Budd Van Ness establishes that a Court can strike a brief for being written with reduced font and reduced margin size. Rule74(p) provides that the briefing rules are to be interpreted liberally. "[A] substantial compliance with these rules will suffice in the interest of justice." 74(p) Tex. R. App. P. The Court may require rebriefing only for "flagrant violation of this rule." *Id.* The Court in *White Budd Van Ness* obviously found that the combination of reduced font size and reduced margin in that case constituted a "flagrant violation" of the Rules, however, the opinion provides absolutely no guidance to future parties seeking to maximize their use of Briefing space under the Rules.

There is no flagrant violation of Rule 74(h) in this case. McIntyre's brief is written in a 12 point Times New Roman font

which is standard to Microsoft Word and widely used in the legal community. It is double-spaced and has a minimum seven eighth inch margin at the top and a minimum one-inch margin at the bottom of each page, not including the page footer. Many pages have larger top and bottom margins, but none have less. The Brief has a three-quarter inch margin on the let and right sides. In short, the fonts and margins of McIntyre's Brief appear to be normal and in "substantial compliance" with the Rules. *White Budd Van Ness* does not allow a brief to be stricken for reduced margin alone, even assuming there was a clear standard on what constitutes a reduced margin. Therefore, the Court may not strike McIntyre's Brief or require him to rebrief.

Furthermore, in the complete absence of any standard as to margin or font size, McIntyre is at least entitled to a clear statement from the Court as to what standards it is looking for so that McIntyre can comply with it. It is entirely unfair, and a

violation of well established constitutional principles, to punish McIntyre for failure to comply with a vague or arbitrary standard. The Court's reference to Rule 74(h) and *White Budd Van Ness* is totally insufficient because those authorities do not state a standard. Accordingly, if the Court finds the Brief is defective as to margin or font size, McIntyre asks the Court to issue an Order clarifying the standard upon which the finding is based.

The Court also found that McIntyre's March 18, 1997 Brief "added 10 additional points of error. Appellant did not file a motion for leave to file the brief." These facts are not relevant so long as McIntyre's Brief otherwise conforms to Rule74(h). By way of explanation, however, McIntyre points out that the increased number of issues is an illusion. In reality, McIntyre's March Brief actually decreased the number of issues. In the course of rewriting the Brief, McIntyre sought the advice of a more experienced attorney who pointed out that the points of

error set forth in McIntyre's February Brief were multifarious. The March Brief simply restated the points of error so they would not be multifarious.

For example, McIntyre's February Brief attempted to set forth in point of error "1" that the Court erred in overruling McIntyre's Motion for JNOV and Motion for New Trial because the jury finding that Clinton and Palter were not negligent, did not breached their fiduciary duty, and deceptive trade practices had been proved as a matter of law. The March Brief merely breaks this single multifarious point of error into its component parts by restating each as a separate point of error. This is done so that the Court can answer each point more precisely. The March Brief's Point of Error 4 is merely a component of the February Brief's multifarious Point of Error 1. It is not an expansion of the issues. The same applies to the other points of error.

More importantly, since the Court struck McIntyre's

previous Briefs, McIntyre's March 18, 1997 Brief is an original, rather than an amended or supplemental brief. As such, leave of the Court should not be required. However, if leave is required, McIntyre requests leave to submit the points of error submitted in his March 18, 1997 Brief. The Court must grant leave to amend, if such leave is in fact required. "Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the Court may prescribe." 74(o) Tex. R. App. P.

CONCLUSION

In order to meet the page-limits McIntyre has not violated, and has certainly not flagrantly violated, the letter or spirit of Rule 74(h) by simply reducing the margin and font size. Rather, he has substantially cut down the restatement of facts, re-organized the argument, cut out redundancies, and eliminated and forgone entire points of error that arguably constitute reversible error. McIntyre's March Brief is in substantial

compliance with Rule 74(h) and should be reinstated. If the Court finds the Brief is not in substantial compliance with the Rule, the Court must, in the interest of justice and fairness, make a clear statement of the standard by which it has made such a finding so that McIntyre can comply with it.

WHEREFORE, PREMISES CONSIDERED, McIntyre requests the Court to reinstate his Appellant Brief filed March 18, 1997 because it conforms to the Rules. If the Court finds on reexamination that the Brief is defective, McIntyre requests the Court to issue an Order clarifying the precise nature of the defect and the precise standard that any future Brief must conform to. If the Motion to Reinstate is denied, McIntyre further requests an extension of time to file a conforming Brief of at least 30 days from the date of denial of the Motion to Reinstate or issuance of a clarifying Order, whichever comes last. If such is necessary, McIntyre further requests leave to file a Brief containing the points of error stated in his March 18,

1997 Brief.

Respectfully Submitted

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been served on all counsel of record by fax transmission in accordance with the Texas Rules of Civil Procedure on this the 18th day of April, 1997.

/s/ Frank W. McIntyre
Frank W. McIntyre

WHITE BUDD VAN NESS PARTNERSHIP,
Petitioner,

v.

MAJOR-GLADYS DRIVE JOINT VENTURE,
Respondent.

No. D-0502

Supreme Court of Texas

March 20, 1991.

Rehearing Overruled April 17, 1991.

Prior Report: 798 S.W.2d 805.

ORDER

On January 24, 1991, this Court overruled Petitioner's motion to permit a brief in excess of the page limit fixed by Rule 131(i) of the Texas Rules of Appellate Procedure. Petitioner then submitted a revised application; but because the application still did not comply with the Rules of Appellate Procedure, the Court ordered the application redrawn. Tex. R. App. P. 131(j). Petitioner has since submitted another redrawn application. Although the redrawn application technically achieves compliance with the fifty-page limit, it does so only through reduction of print size and diminution of margins, rendering the application difficult to read. This violates the spirit of Rule 131(i), if not the letter of the rule. Because Petitioner's redrawn application fails to conform to the requirements of Rule 131(i),

Tex. R. App. P., we strike Petitioner's Application for Writ of Error and the same is dismissed.